IN THE MISSOURI SUPREME COURT

Case No. SC85896

STATE EX REL. CHRIS K. RITZ

Relator,

v.

MISSOURI COURT OF APPEALS,
WESTERN DISTRICT OF MISSOURI

Respondent.

On Petition for Writ of Mandamus
Directed to
Missouri Court of Appeals,
Western District of Missouri

BRIEF OF RELATOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Codes

JURISDICTIONAL STATEMENT

Chris K. Ritz brings this proceeding in Mandamus against the Missouri Court of Appeals for the Western District of Missouri. Ritz asserts that the Western District improperly denied and refused his request for leave to file an amended or substitute Appellant's Brief after his Public Defender refused and failed to include all points of error from trial. Ritz claims the Western District acted in violation of a duty by the Court to allow the substitute brief. On April 20, 2004, after proper *pro se* application for a writ, this Court granted its Alternative Writ of Mandamus. On May 25, 2004 this Court appointed Ritz Counsel and activated the Rule 84.24(i) briefing schedule. Upon Motion for Extension of Time to File Brief this Court allowed Ritz up to and including July 26, 2004 to file this brief. Pursuant to Rule 94.01 et. seq. and *Mo. Const. art. V sec. 4* this Court has jurisdiction to hear this writ.

STATEMENT OF FACTS

I. Preliminary Factual Background

Chris K. Ritz moved from Ft. Scott, Kansas to Kansas City in July 1997. (A25; A326-A329 (all cites herein to "A" followed by numerals are to the Appendix filed herewith)). Upon moving to Kansas City, Mr. Ritz met Robin Cummins through a mutual friend. (A28). Ms. Cummins lived in a townhouse with her then six-year-old daughter Mariah. (A28). On July 3, 1997, Mr. Ritz moved into and rented out the basement of Ms. Cummins townhouse. (A29). Mr. Ritz has claimed, and Ms. Cummins has admitted to the fact, that there were constant visitors upstairs in the main household as well as blatant drug usage. (A29). In October of 1997, Mr. Ritz moved out of Ms. Cummins' townhouse after she received notice that boarders were not allowed. (A30). After Mr. Ritz had moved out, Mariah allegedly began telling people, including her mother and social workers, that Mr. Ritz had shown her pornographic movies, touched and rubbed her vagina with his finger, licked her vagina with his tongue, and made her touch his penis with her hand. (A30; A31; A32).

Mr. Ritz was arrested and charged with three counts of the unclassified felony of first degree statutory sodomy, Section 566.062 RSMo 2000, and one count of the class C felony of child molestation, Section 566.067, RSMo 1994. (A23). Counts I and II alleged that Mr. Ritz penetrated Mariah's vagina with his finger. (A23). Count III alleged that he touched Mariah's genital area with his tongue or mouth. (A23). And Count IV alleged that Mr. Ritz caused Mariah to touch his genitals. (A23). On January 24-25, 2000, the cause

proceeded to trial before a jury in the Circuit Court of Clay County, Missouri. (A4). The Honorable David W. Russell presided. (A2).

During the trial, Mariah testified that Mr. Ritz had given her a "tickle spot" by licking his finger and putting it in her underwear. (A39). She also stated that on several occasions Mr. Ritz had shown her pornographic movies and that he would put his finger in her vagina "almost every day." (A39; A40). Mariah testified that Mr. Ritz made her touch his penis three times; once outside of his clothes, once outside of his underwear and once inside of his underwear. (A40). In her testimony, she asserted that Mr. Ritz once tried to lick her vagina but she would not let him. (A40). She said that instead, he licked her knee and told her that it would feel very similar. (A40). Again, she refused. (A40). Lastly, Mariah testified that Mr. Ritz told her that if she told anybody about what he had done to her, her mother would go to jail. (A40). After the close of the State's evidence, the court sustained Mr. Ritz's motion for judgment of acquittal on Count II. (A61).

Mr. Ritz testified on his own behalf and denied ever inappropriately touching Mariah. (A73). At the close of all of the evidence, Chris Ritz moved for a judgment of acquittal on the three remaining counts. (A75). The court denied this motion but amended Count III to attempted first degree statutory sodomy. (A75). The jury found Mr. Ritz guilty on Counts I and III and not guilty on Count IV. (A81). State of Missouri v. Chris K. Ritz, No. WD 58371, Memorandum Op. at 2-3 (Mo.App. W.D., March 6, 2001). (A219). On March 10, 2000, Ritz was sentenced to fifteen (15) years in the Missouri Department of Corrections for statutory sodomy in the first degree and seven (7) years for attempted statutory sodomy in the first degree. (A86).

II. Direct Appeal

Mr. Ritz appealed his convictions directly. On March 6, 2001, the Missouri Court of Appeals, Western District issued an Order and Memorandum denying the appeal. State of Missouri v. Chris K. Ritz, No. WD 58371 (Mo.App. W.D., March 6. 2001). On July 3, 2001 the court issued its mandate in Mr. Ritz's direct appeal. (A208).

III. Post-Conviction Proceedings

Mr. Ritz filed a *pro se* Rule 29.15 motion in the Circuit Court of Clay County, Missouri on September 14, 2001. (A216). Postconviction counsel was appointed by the motion court to represent Mr. Ritz. (A310). The motion court also granted an extension of time to file an amended Rule 29.15 motion. (A310). In this time, Mr. Ritz hired attorney Thomas L. Ray to represent him. (A310). Appointed postconviction counsel withdrew from the case. (A310). On December 17, 2001, Mr. Ray, on Ritz's behalf, filed an amended Rule 29.15 motion which alleged the following claims of ineffective assistance and other error in support of the Motion to Vacate, set aside or amend the judgment: (A214).

1. The alleged victim, Mariah Bennett, testified "that Chris tried to lick my private spot and wouldn't let him and then he did it on my leg. I still wouldn't let him." (A210). Since the alleged victim denied any oral contact with her vaginal area, trial counsel should have objected to the testimony of other witnesses as to statements made by Mariah Bennett regarding oral sodomy. (A210).

2. Trial counsel failed to investigate and failed to call Shelly Thompson as a trial witness. (A210). Shelly Thompson, interviewed by the child abuse investigator, was the

first person to interview the alleged victim, Mariah Bennett. (A210). Shelly Thompson's investigation techniques, leading questions and authoritative demeanor towards the alleged victim should have been presented to the jury. (A210).

3. Mariah Bennett repeatedly answered in the trial to questions by the prosecuting attorney with the answer "Uh-huh" and "Uh-huh, no" (A39-A40; A210). Trial counsel failed to object to the "Uh-huh" answers and failed to illicit a clear and unequivocal response from the witness Mariah Bennett. (A210).

4. Trial counsel failed to explore the possibility and present expert witnesses on behalf of Movant to challenge the interrogation techniques used by the State when questioning and examining the alleged victim. (A208). The Movant spoke with trial counsel prior to the trial about hiring and having an expert witness to testify at trial on behalf of Movant. (A210). Trial counsel told Movant that it was too expensive to have and hire an expert witness. (A210). Movant needed an expert witness to question the interrogation technique, leading questions and interview of Shelly Thompson among others. (A211).

5. Trial counsel failed to illicit testimony that the victim and her mother moved and did not want to prosecute nor testify against Movant. (A208). Trial counsel and Movant were aware of the fact that the alleged victim and her mother moved and had told the prosecuting attorney that they did not want to prosecute the case. (A211). Nevertheless, the prosecuting attorney continued to prosecute these charges. (A211). Trial counsel failed to question the alleged victim's mother as to whether or not they moved and did not wish to prosecute Movant. (A211).

6. Trial counsel failed to call defendant's mother as a witness to testify that she had received a phone call from the victim's mother demanding money in exchange for not prosecuting Movant. (A208). Movant's mother, Paula Ritz, would have testified that she received a phone call from a woman believed to be the mother of the alleged victim wherein the mother of the alleged victim told Movant's mother that if she would send a sum of money to the alleged victim's mother, they would not prosecute the charges against Movant. (A211). Defense attorney did not make any effort to present any of this evidence.

7. Trial counsel failed to illicit testimony from Movant and other witnesses that his VCR which the victim claimed had been in the basement of the home was actually located in Movant's bedroom in the upper story of the home and the Movant had no VCR. (A208, A209). The movant had no VCR. (A326)

8. Trial counsel failed to object to the state's continuous leading line of questioning of the alleged victim and failed to file a request for a speedy trial pursuant to Section 545.780 RSMo; (A209).

9. Trial counsel failed to object to any testimony presented by witnesses pursuant to section 491.675 and following RSMo of oral sodomy on witness Mariah Bennett, the alleged victim, for the reason that Mariah Bennett testified during the trial and during that testimony denied that there was any oral contact between the Movant and the vaginal area of Mariah Bennett. (A209). Such witnesses included David McDowell. (A211).

10. Appellate counsel, Tara L. Jensen, was ineffective and failed to adequately argue that there was insufficient evidence to support the conviction. (A209).

11. The Movant was denied his federal and state constitutional rights to a speedy trial. (A209).

12. The court erred in allowing that state to amend the charge against Movant from a charge of statutory sodomy 1st degree to attempted statutory sodomy 1st degree after the closing of the state's case in violation of Movant's rights to due process and equal protection under the Federal and Missouri constitutions. (A209).

Upon being appointed to the bench, Mr. Ray was forced to withdraw from Chris Ritz's case.[1] (A311). Another postconviction counsel took over the case. (A311). On February 6, 2003 the motion court held an evidentiary hearing for Mr. Ritz's motion. (A311). Ross Nigro, Mr. Ritz's trial counsel, testified that prior to the trial Mr. Ritz had given him a list of potential witnesses to contact in preparation for the trial. (A222). Mr. Nigro recalled during his testimony that the defense theory at Mr. Ritz's trial was that Robin Cummins, Mariah's mother, was angry because she had not received a sum of money owed to her by Mr. Ritz. (A223). Because of the owed money and because Ms. Cummins and her friend Shelly Thompson hated Mr. Ritz, they used Mariah as a "pawn" against him. (A223). Mariah supposedly first reported Mr. Ritz's sexual behavior to Ms. Thompson. (A223).

Mr. Nigro testified that he did speak with Ms. Thompson but stated that "she hated Mr. Ritz and I would not call her to the stand." (A223). He further noted that Ms. Thompson "was not helpful" and at one point could not be found. (A225). The last he knew

[1]Mr. Ray was appointed to Associate Circuit Judge Division III of St. Francois County.

of her whereabouts was that she was a stripper at Diamond Joe's in Coffeeville, Kansas. [Note: this may be an incorrect city.] (A225).

Mr. Nigro further testified that in the pretrial deposition and at trial, Mariah had said that there had been no contact involving Mr. Ritz licking her "vagina area." (A228). This testimony, Mr. Nigro admitted, affected how he attacked the testimony of other witnesses relating statements made by Mariah which were inconsistent with those that Mariah had actually said on record. (A228; A229). Trial counsel explained that it was Mr. Ritz's "main argument . . . that it's gotta be a lie because we're getting three or four different versions of what happened." (A229). Trial counsel believed that the state's witnesses were allowed to testify that oral sodomy/contact had occurred due to "the 491 hearing" held prior to trial. (A229). When David McDowell, an investigator for the Division of Family Services, testified that Mariah had stated Mr. Ritz had "licked her private areas," trial counsel did not object at trial because such testimony "was already deemed admissible after the 491 hearing" and because "it was very inconsistent with Mariah's testimony, and that's what we were basing our whole defense on." (A230). Trial counsel stated that he believed more inconsistencies in the State's case benefitted Mr. Ritz's case. (A230).

At the hearing, Mr. Ritz testified that he had written several letters to Mr. Nigro. (A254; A255). In these letters Mr. Ritz explained that Ms. Thompson and her friends worked at a strip club and would come to the house when they got off of work. (A255). On two occasions, Mr. Ritz claims, Ms. Thompson and her friends took Mariah with them to the strip club to collect their money. (A255). Mr. Ritz has stated, "we've got strippers and takin' kids to strip clubs and I wanted [trial counsel] to bring that up at trial, and he didn't."

(A255). Furthermore, Mr. Ritz has asserted the fact that for a period of time Ms. Cummins and Mariah could not be found. (A255). Eventually, it was discovered that they were temporarily living with Ms. Thompson. (A255).

Upon the conclusion of the hearing, the motion court requested that both parties submit proposed findings of fact and conclusions of law, granting 30 days for the proposals to be submitted. (A274). Schilmoeller failed to do so. (A327). On March 4, 2003, the motion court entered findings of fact and conclusions of law denying Mr. Ritz's Rule 29.15 motion. (A278). Mr. Ritz, through counsel, filed a notice of appeal on April 11, 2003. (A303).

Court-appointed public defender, John M. Schilmoeller, filed an appellate brief in the Missouri Court of Appeals Western District on Mr. Ritz's behalf. (A303-A329).

In his brief before the Western District, Mr. Schilmoeller failed and refused to address all but two of the points Thomas Ray presented to the trial court in the amended 29.15 motion – despite repeated requests by Ritz. (A303-A329). Furthermore, Mr. Schilmoeller failed to maintain proper and effective communication with his client. (A284-A302).

In preparing and filing an appellate brief in the Western District following the denial of Ritz's 29.15 motion, Mr. Schilmoeller:

- failed to brief significant allegations of error from which rational arguments for relief may be constructed based upon constitutional, statutory and case law;

- filed the appellate brief without any review or meaningful input from Mr. Ritz; (A327).
- failed to provide Ritz a draft copy of the brief he intended to file; (A327).
- failed to timely provide Ritz with a copy of the brief that was actually filed (A284-A302);
- failed to brief points Ritz wanted briefed and preserved for further review; (A328)
- encouraged Ritz's detrimental reliance in Schilmoeller filing a thorough brief thereby denying Ritz the opportunity to brief points on appeal *pro se* instead of depending on the public defender. (Id.)
- failed to advise Ritz that Ritz could file his own brief or provide additional points that Ritz wanted briefed to counsel or the Court. (Id.)

Schilmoeller unilaterally determined which issues to present on appeal. (A284). Schilmoeller did so complaining in writing that: his heavy case-load and time constraints would not permit Ritz's pre-filing review of the brief or any other documents filed with the appellate court (A284); his [the Missouri Public Defender's] office would not accept collect phone calls (A284); Schilmoeller's 9 years of experience gave him a good idea of which issues could be waived as being frivolous. (A287). Mr. Ritz filed a motion to dismiss Mr. Schilmoeller which was denied on February 10, 2004. (A302).

IV. Writ Proceedings

Alarmed by the insufficiency and deficiencies of the Public Defender's brief, Ritz immediately moved for the Court to allow Ritz leave to dismiss appointed counsel and file an Amended Brief (i.e. substitute brief). Ritz's request for relief was denied.

This court, upon Ritz's *pro se* Petition granted its alternative writ (A325) and gave the Western District a choice: allow Ritz to file a substitute brief or show cause why it would not be allowed. The Western District did not allow the requested relief, perhaps to get this Court's guidance on how to handle a recurring question: What does our State require from appointed postconviction counsel?

Additional relevant facts are set forth in the Argument below. Additional detail may be gleaned from the lengthy Appendix filed simultaneously herewith.

POINTS RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ENTER AN ORDER ALLOWING HIM LEAVE TO FILE A SUBSTITUTE/AMENDED BRIEF BECAUSE HE HAS BEEN DENIED AN EFFECTIVE DEFENSE AND MEANINGFUL POSTCONVICTION APPELLATE REVIEW IN THAT HIS COURT-APPOINTED PUBLIC DEFENDER FAILED AND REFUSED TO BRIEF KEY POINTS OF ERROR FROM TRIAL, FAILED AND REFUSED TO TIMELY ADVISE RITZ OF THE STATUS OF HIS APPEAL, FAILED TO INVESTIGATE KEY EVIDENTIARY ISSUES, AND FAILED TO FILE AN APPELLATE BRIEF IN THE WESTERN DISTRICT THAT SET FORTH POINTS OF ERROR FROM WHICH RATIONAL ARGUMENTS FOR RELIEF MAY BE CONSTRUCTED BASED UPON EXISTING LAW THAT RITZ BELIEVES TO BE OUTCOME DETERMINATIVE.

State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights, 77 S.W.3d 600, (Mo. banc 2002)

Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396 (1967)

Luster v. State, 785 S.W.2d 103, 107 (Mo. App. W.D. 1990)

Rule 29.15

ARGUMENT

POINTS RELIED ON

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I. STANDARD OF REVIEW– MANDAMUS

This Court will issue a writ of mandamus when necessary to correct an abuse of judicial discretion or to prevent the exercise of extra-judicial power. State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights, 77 S.W.3d 600, (Mo. banc 2002). A writ of mandamus will issue where a court has exceeded its jurisdiction or authority. State ex rel. Schnuck Markets, Inc. v. Koehr, 859 S.W.2d 696, 698 (Mo. banc 1993). The writ will lie both to compel a court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing. State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 506 (Mo. banc 1998).

II. FAILURE TO BRIEF KEY POINTS OF TRIAL COURT ERROR

A. Duty of Appointed Counsel in Postconviction Cases

It appears from a review of United States Supreme Court law that there is no constitutional right to counsel in postconviction proceedings and no constitutional claim for ineffective assistance of postconviction counsel on the federal level. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); See also State v. Hunter, 840 S.W.2d 850, 871 (Mo. Banc 1992), cert. denied 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1993). This is because "[p]ostconvicton relief is even further removed from the criminal trial than is discretionary direct review." Finley, 481 U.S. at 556-557. However, Missouri provides appellate counsel for indigent defendants in postconviction cases. *Accord* Rules 29.15 and 24.035; See State ex rel. Public Defender Comm'n v. Bonacker, 706 S.W.2d 449 (Mo. Banc 1986). Individual states are free to create such a right. See Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Missouri appears to make no provision for reviewing claims of ineffective assistance of postconviction counsel. *Accord* State v. Ervin, 835 S.W.2d 905 (Mo.banc 1992); State v. Hunter, 840 S.W. 2d 850, 871 (Mo. banc1992). Nonetheless, postconviction counsel are ethically bound to comply with their professional responsibilities to the client and Court, including, *inter alia*, Rules 55.03; 29.15; 4-3.1.

1. Duty of Counsel in Postconviction Proceedings at the Trial Court in Missouri

a. Generally

At the trial court level when a prisoner files a *pro se* Rule 29.15 Motion and then has counsel appointed, the law is clear that counsel must act. Johnson v. Buehler, 767 S.W.2d 351 (Mo. App. 1989); Rule 29.15(e). An incarcerated person's right to review of his conviction for constitutional infirmity is important in Missouri's system of justice and therefore appointed motion counsel must provide a certain level of representation. Id. When the court concludes that counsel has totally defaulted in performing his duties, it should appoint new counsel and restart the running of time limitations for amendment. Luster v. State, 785 S.W.2d 103, 107 (Mo. App. W.D. 1990).

In Luster, for example, motion counsel failed to acquaint himself with potential grounds for relief, redraft claims of ineffective assistance of trial counsel and to participate actively on the movant's behalf. Id. Motion counsel also failed to obtain a copy of the *pro se* motion and advise the court of a timely-filed *pro se* request for a 29.15 hearing. Id. The Luster court found that such complete failure to supply legal services deprived Luster of any opportunity to fully and fairly litigate his claims for postconviction relief. Id. In that case Mr. Luster made unavailing attempts to gain counsel's cooperation

and then requested the court's assistance, only to be disqualified for untimely filing and failure to verify. Id. The court held that the extraordinary relief of reversal for appointed motion counsel's failure to amend a *pro se* 29.15 motion does not arise unless the record indicates that the movant had a justiciable claim that appointed counsel failed to present. Id. (citing State v. Perez, 768 S.W.2d 224, 228 (Mo. App. 1989); Woolsey v. State, 738 S.W.2d 483, 485 (Mo. App. W.D. 1987)). The appellant's brief must specify the additional grounds that counsel neglected to raise. Grove v. State, 772 S.W.2d 390, 393 (Mo. App.1989); Guyton v. State, 752 S.W.2d 390, 392-93 (Mo. App. 1998). Mr. Luster met this requirement by identifying his claims of ineffective assistance of trial counsel for failure to request a mental examination and to interview named witnesses. He also raised colorable claims in his original *pro se* motion relating to trial counsel's alleged failure to request changes of judge and venue that the motion court may not have properly examined before dismissal without an evidentiary hearing. On those facts, the Western District reversed the judgment and remanded the cause to the circuit court for appointment of new counsel and further proceedings under Rule 29.15. Id. Such a course of action preserves all claims of error and advances the client's cause. Id.

Under Rule 4-3.1 Meritorious Claims and Contentions

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension,

modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Under Rule 29.15(e):

> When an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

Under Rule 55.03(b):

> Representation to the Court. By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading,

motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

(1) the claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

These rules combine to ensure that the State and defendants are well represented and the Court's time is not wasted. In Mr. Ritz's case, appointed counsel's time constraints and quick judgment that all but two of Mr. Ritz's postconviction points were meritless deprived Ritz the opportunity for Appellate Review.

b. Mr. Ritz's Postconviction Motion and Hearing

Thomas Ray, counsel for Ritz on his amended Rule 29.15 motion carefully presented issues to the trial court and assured they would be preserved for appeal. Thomas Ray followed the requirements of Rule 29.15, 55.03 and the Rules of Professional Conduct.

At the trial court hearing on the rule 29.15 Motion, Ritz was represented by Schilmoeller. Schilmoeller met Ritz for the first time 15 to 20 minutes before the hearing. (A326-A329). Schilmoeller had not read the trial transcript. (A326). Schilmoeller asked Ritz to find, in short order, places in the trial transcript that supported the arguments that Ritz demanded Schilmoeller to present. (A326).

Schilmoeller did not do a thorough job presenting the Motion (See A215-A277), especially with regard to the failure of trial counsel Ross Nigro to challenge the interrogation techniques of the social workers who questioned alleged victim Marriah Bennett and the failure to follow-up on the phone call from Marriah's mother to Ritz's mother demanding money. The Court requested counsel for the State and Ritz to file proposed findings of fact and conclusions of law and Schilmoeller failed to timely do so. (A326-A329).

Prior to May 14, 2003 Ritz requested that Schilmoeller allow Ritz to approve everything destined for the Western District prior to filing. Schilmoeller responded by letter dated May 14, 2003: "… As for your request to approve everything prior to filing, unfortunately, since my heavy caseload forces me to work very close to deadlines, I cannot submit items to you ahead of time for your approval. My judgment on what arguments to include will be based on the record in your case, the applicable law and my experience. I

certainly welcome any suggestions you would like to offer. If, in the end, you disagree with my decisions, you are free to represent yourself on appeal or to hire your own attorney to do so…." (A284). In the end, Ritz did disagree with Shilmoeller's decisions, but he has not had the opportunity to represent himself or hire his own attorney. Also, in the May 14 letter Schilmoeller advised Ritz that the Public Defender's office would no longer accept collect phone calls. Id. Ritz wrote Shilmoeller begging that all 29.15 points be included on appeal. Schilmoeller replied by letter dated June 18, 2003, "[a]s for your request to have all points included on appeal, I will have to look at the record and see what issues are supported by the facts of your case and the law. I am not allowed to raise anything frivolous..." (A286).

Ritz wrote back on June 24 emphasizing the importance of Schilmoeller raising all points on appeal and letting the court decide the issues. Schilmoeller responded "…In almost nine years of handling such cases, I have developed a good idea of what issues can and cannot be raised." (A287). As of July 14, 2003, the transcript of the 29.15 had not yet been received. (See A288).

On August 18, 2003 Ritz moved, *pro se*, to have the Western District Compel Defense Counsel to "Allow Prefiling Review of State Appeal Case to Allow App[e]llant an Opportunity to Actively Participate in his Own Defense Assigned to Public Defenders" (sic). (A289).

Schilmoeller moved for an extension (due to, *inter alia*, his "obligations in several other cases"), which was granted making Ritz's Western District brief due November 21, 2003. (A290). Next, Schilmoeller wrote Ritz on December 1, 2003 stating that "Due to

some unforeseen changes in my schedule, it was necessary for me to take additional time to prepare and file your brief. The brief is now due to be filed on December 9, 2003, and it will be filed then…. [T]he delay was unavoidable…" (A291).

Schilmoeller had not provided – and did not provide – Ritz a copy of a draft brief at any time.

When the brief was filed, Ritz did not receive a copy. Ritz requested a copy from the public defender's office and then from the Western District. The Western District wrote back that it would charge $.50/page for copies. (A292). Ritz could not pay this amount. Ritz wrote Schilmoeller again stating:

> "You have not sent me a copy of what you filed with the Court of Appeals as you said you would. I have not been able to reach your office by phone and my letters are not being properly addressed. This raises some very serious concerns about the quality of service and doubts about whom you are representing in my case. I have several important issues of fact and law that I tried to communicate to you that was initially raised in the 29.15 that should have been included in my appeal as per my previous letters and phone calls. For over a month now you have again failed to send me a copy of what you filed and giving me an opportunity to review and assist in my legal defense.
>
> When you spoke with my Mother on the phone you basically told her that you read enough to in the transcript that you were convinced that I am guilty. Now, if the key witness who committed perjury and was engaged in extortion for money form me was not properly cross-examined at trial and

other key evidence, that was not fully exploited to prove perjury is also evident. Then you believe the perjured of the states key witness which is the only flimsy evidence that convicted me. I do not appreciate the lack of professionalism you have shown thus far. The total lack of communications or failure to give me a copy of what you filed is contrary to what you have told me in the past conversations. Then you told my Mom that you got a postponed, then you filed it. It was not right either way. Now I need a copy A.S.A.P.!" (A293).

Finally, Schilmoeller sent a copy of the brief in mid-January 2003. (See A294). Ritz immediately (approximately January 22, 2003 upon recollection and belief) Moved for Shilmoeller's dismissal and for leave to amend appeal. (A298). Amendment was not allowed, which gave rise to these writ proceedings.

On this record which appears before this Court and appointed counsel on this writ proceeding, there is no showing that: Mr. Schilmoeller was well prepared for the trial court 29.15 hearing; Mr. Schilmoeller conducted any research or investigation into the points that Schilmoeller did not present in his brief to the Western District; Mr. Schilmoeller had any basis for his conclusion that only 2 issues should be briefed to the Western District; further, there is no evidence that Schilmoeller ever sought to withdraw as counsel for Ritz.

2. Duty of Counsel in Postconviction Proceedings on Appeal in Missouri

a. Generally

The situation where counsel and client have disagreement on which points of error should be briefed to the appellate court has, predictably, arisen before. Courts address the

issue differently, recognizing the ethical tight wire counsel walks in such a situation. For example, in State v. Zeitvogel, 649 S.W.2d 945 (Mo. App. W.D. 1983), the Western District approved the procedure where counsel argued the points that counsel believed were arguable and separately set forth the substance of points the client wished to raise without support or argument. This was approved as an exercise of professional judgment and left substantial discretion with counsel.

And then in Shelton v. State, 724 S.W.2d 274 (Mo.App. 1986), the Western District considered a brief that included one point, without argument, that was presented by counsel only because of the Appellant's insistence. The Shelton court held that the Zeitvogel procedure was "no longer viable." Shelton at 275. The court continued and explained that if counsel presents a point on appeal, it must be in compliance with the "rules regarding appellate briefs." Id. Weighing "counsel's dilemma," the court observed that counsel must – when they think an appeal is frivolous – try to persuade the client to drop the case. Id. If the client wishes to go forward, counsel should present the case if it can be done without misleading the court or should request to withdraw. Id. at 275-276.

Though these cases give some guidance, this case is distinguisible from the above. This case is a combination of: 1) the refusal of counsel to allow Ritz to review counsel's work (thereby depriving Ritz the opportunity for input on counsel's work or to brief *pro se*); 2) the use by counsel of multiple excuses to avoid communicating with the client and 3) the potential loss by Ritz of meaningful review of points on appeal which are arguable; and 4) no effort by counsel to withdraw from representing Ritz.

b. Mr. Ritz's Postconviction Appeal

(1) What Was Briefed.

The following points of appeal were briefed and presented to the Western District by John Schilmoeller without input from Mr. Ritz:

1. The motion court clearly erred in overruling Mr. Ritz's Rule 29.15 motion for postconviction relief, because Mr. Ritz was denied his rights to effective assistance of trial counsel and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that Mr. Ritz's trial counsel failed to object to testimony by state's witnesses Janice Farrell and David McDowell regarding any alleged oral contact between Mr. Ritz and the vaginal area of Mariah Bennett. Mariah previously had testified at trial that Mr. Ritz had "tried to lick [her] private spot and [she] wouldn't let him," and thus, Mr. Ritz's trial counsel should have objected to testimony relating contradictory out of court statements on that issue. (A303-A324).

2. Mr. Ritz's trial counsel failed to properly contact, investigate, subpoena and present Shelly Thompson as a defense witness at Mr. Ritz's trial. Such testimony would have supported Mr. Ritz's defense by further explaining to the jury the circumstances in which Mariah first reported the alleged incidents with Mr. Ritz, Ms. Thompson's relationship with Ms. Bennett and Mariah, and Ms. Thompson's negative feelings toward Mr. Ritz. (Id.).

(2) What Was Not Briefed

Ten of the twelve points presented by Attorney Thomas Ray in the Amended 29.15 motion for vacating, setting aside or correcting the conviction and sentence were arbitrarily

and unilaterally left out of the Western District brief by Mr. Schilmoeller and against Chris Ritz's desire and intent. Even a cursory review of these points tells the legal mind that briefing is necessary.

The points Schilmoeller left out of Ritz Western District brief were (in abbreviated form):

- Mariah Bennett repeatedly answered in the trial to questions by the prosecuting attorney with the answer "Uh-huh". Trial counsel failed to object to the "Uh-huh" answers and failed to illicit a clear and unequivocal response from the witness Mariah Bennett.
- Trial counsel failed to explore the possibility and present expert witnesses on behalf of Movant to challenge the interrogation techniques used by the State when questioning and examining the alleged victim. The Movant spoke with trial counsel prior to the trial about hiring and having an expert witness to testify at trial on behalf of Movant. Trial counsel told Movant that it was too expensive to have and hire an expert witness. Movant needed an expert witness to question the interrogation technique, leading questions and interview of Shelly Thompson among others.
- Trial counsel failed to illicit testimony that the victim and her mother moved and did not want to prosecute nor testify against Movant. Trial counsel and Movant were aware of the fact that the alleged victim and her mother moved and had told the prosecuting attorney that they did not want to prosecute the case. Nevertheless, the prosecuting attorney continued to prosecute these

charges. Trial counsel failed to question the alleged victim's mother as to whether or not they moved and did not wish to prosecute Movant.

- Trial counsel failed to call defendant's mother as a witness to testify that she had received a phone call from the victim's mother demanding money in exchange for not prosecuting Movant. Movant's mother, Paula Ritz, would have testified that she received a phone call from a woman believed to be the mother of the alleged victim wherein the mother of the alleged victim told Movant's mother that if she would send a sum of money to the alleged victim's mother, they would not prosecute the charges against Movant.
- Trial counsel failed to illicit testimony from Movant and other witnesses that his VCR which the victim claimed had been in the basement of the home was actually located in Movant's bedroom in the upper story of the home and the Movant's VCR was never in the basement of the home where the victim alleged the acts took place.
- Trial counsel failed to object to the state's continuous leading line of questioning of the alleged victim and failed to file a request for a speedy trial pursuant to Section 545.780 RSMo;
- Trial counsel failed to object to any testimony presented by witnesses pursuant to section 491.675 and following RSMo of oral sodomy on witness Mariah Bennett, the alleged victim, for the reason that Mariah Bennett testified during the trial and during that testimony denied that there was any

oral contact between the Movant and the vaginal area of Mariah Bennett. Such witnesses included David McDowell.

- Appellate counsel, Tara L. Jensen, was ineffective and failed to adequately argue that there was insufficient evidence to support the conviction.
- The Movant was denied his federal and state constitutional rights to a speedy trial.
- The court erred in allowing the state to amend the charge against Movant from a charge of statutory sodomy 1st degree to attempted statutory sodomy 1st degree after the closing of the state's case in violation of Movant's rights to due process and equal protection under the Federal and Missouri constitutions.

(3) Points Not Frivolous

a. "Frivolous" Defined

Inherent in the concept of frivolousness is the idea that a claim or a defense asserted is so lacking in any rational argument based on the evidence or law that the presentation of the defense or claim amounts to an abuse of the process. It is a claim or assertion which is clearly insufficient on its face. Rather than being a claim or defense that has "little prospect that it can ever succeed," as expressed in State ex rel. State Highway Commission v. Sheets, 483 S.W.2d 783, 785 (Mo.App.1972), it is a claim or defense that has absolutely no prospect of succeeding. If an argument has any meaningful chance of success, even though that chance may be slim, it cannot be considered frivolous Browder v. State, 18 S.W. 3d 510 (Mo. App. W.D. 2000). If an argument has little prospect of success in view

of existing precedent, but a rational argument can be constructed based upon principles flowing from the constitution or statutory authority, the argument is not frivolous. Moreover, a good faith argument for an extension, modification or reversal of existing law is not frivolous. Rule 4-3.1. In Thurman v. State, 859 S.W.2d 250, 254 (Mo. App. 1993), the Western district suggested that sanctions could be imposed when the argument was "so manifestly and palpably devoid of merit both on the facts and the law as to be completely untenable." For purposes of criminal appeals or postconviction appeals, an argument only when that argument is so clearly and facially without a rational argument based in law, or is otherwise so clearly and facially untenable that it has no prospect of success will be considered frivolous. See Browder, 18 S.W. 3d at 511.

b. Ritz's Points not Frivolous

Ritz's amended motion for postconviction relief was presented to the trial court by Thomas Ray. We may presume that each point Ray presented was done in good faith and therefore was not frivolous. *Accord* State v. Creason, 847 S.W.2d 482 (Mo.App. W.D. 1993); State v. Thomas, 526 S.W.2d 893, 896 (Mo.App.1975). Upon such presumption, Schilmoeller should have briefed and presented each point from the trial court level.

III. The Goal: To Reasonably Ensure That an Appeal is Resolved in a Way that is Related to the Merit of That Appeal.

A. Sound Approach

The Western District itself, in its unpublished opinion available on Westlaw provided a suggestion for a sound Missouri approach to this issue.

Their test stated:

Although an Anders [Note: Anders v. State of California, 386 U.S. 738; 87 S.Ct. 1396 (1967) is discussed in this quote and below at Section III. C.] type of brief is not constitutionally required under Pennsylvania v. Finley, we believe requiring the preparation of such a brief is the best approach. Such a requirement is consistent with the expression in Rules 29.15 and 24.035 of Missouri's commitment to ensuring confidence in the administration of justice. We believe counsel torn by the seeming conflict between the state provision of right to counsel and the risk of sanction for frivolous argument will recognize the value of an Anders brief when counsel finds nothing arguable to present.

We therefore adopt essentially the same procedure as for direct appeals. When the client has arguable claims, counsel should present only the arguable claims. Also, counsel may "winnow out" those points having less merit, even if such points are arguable, when counsel is presenting points which are more meritorious. If counsel believes there is no arguable claim after counsel has carefully studied the legal file and applicable transcripts, we direct counsel, until instructed otherwise by court precedent or by court rule, to proceed as follows:

a. Counsel should advise the client of the attorney's responsibility to comply with Rule 4-3.1 and Rule 55.03(b), and of the client's own possible exposure to a monetary sanction for the assertion of a frivolous claim under Rule 84.19. Counsel should also ensure that the client has been informed of

the "clearly erroneous" standard of review applicable to appeals of postconviction motions.

b. Unless the client wishes to abandon the appeal, counsel shall then prepare and file an "Anders brief" in which counsel sets forth a summary of the case, including procedural and evidentiary rulings in the trial court, with citations to the record, so that the court can satisfy itself that counsel has thoroughly reviewed the record, and the court can determine whether, in the court's view, there are no nonfrivolous grounds for appeal. Counsel should attempt to identify possible issues, and should indicate any issues the client suggests may be meritorious. Counsel is not to argue the case against his or her client, but instead shall present the record and indicate possible issues which counsel has considered or which have been suggested by the client. Counsel should seek leave to withdraw, stating that counsel has not been able to identify nonfrivolous grounds for appeal.

c. If the court concludes that there are no nonfrivolous grounds for appeal, counsel should be allowed to withdraw, and the appellant should be allowed to proceed *pro se* if the appellant desires. If the court concludes there is at least one arguable ground for appeal, even if it appears unlikely that such argument would prevail, the court should decline to grant leave to withdraw, and should specify the point or points the court desires argued.

This court will either grant leave to withdraw to counsel, and consider any *pro se* brief submitted by the appellant, or else this court will deny leave

and instruct counsel as to any point as to which the court desires briefing. The state will be relieved of the responsibility of responding to such appeals.

Compared to direct appeals, appeals of postconviction motions generally present a smaller range of potential issues. As to Rule 24.035 claims of ineffectiveness, the transcripts may easily be reviewed to determine whether there is any ground for argument. As to Rule 29.15 claims of ineffectiveness, the pertinent portions of the trial transcript may generally be reviewed along with the motion and the transcript of any hearing on the motion. Either way, the claims to be considered are generally more readily identifiable than potential claims of error in a direct appeal. Because of the more limited range of issues, because of the "clearly erroneous" standard of review, in some appeals of some post-conviction motions it will be more difficult to find arguable issues. However, the filing of an Anders brief will help ensure that the rights of the client under Rules 29.15 and 24.035 will be protected, and the benefit provided the client will go beyond federal constitutional guarantees of counsel. Finley, 481 U.S. at 556, 107 S.Ct. 1990.

Martin v. State, 2000 WL 342133 (Mo. App. W.D.).

B. Another Solution Alternative

As an alternative, this Court could simply extend Rule 29.15(3) to apply to the postconviction proceedings. The rule new or modified could read:

Pro se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a *pro se* motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed. *If the motion is denied at the trial court level, on appeal counsel shall present all claims known to counsel and appellant. If counsel determines that no valid claims for appeal exist--or that appellant wishes counsel to file claims that counsel believes to be frivolous, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) no points shall be briefed or that all facts supporting the claims are asserted in the brief and (2) all claims known to the movant are alleged in the brief. The statement shall be presented to the Appellant*

prior to filing. The Appellant may file a reply to the statement not later than ten days after the statement is filed.

Italics indicates suggested additional text.

C. California Approach

Another approach which would provide clear guidance to counsel and defendants is found in California.

Every indigent has a constitutional right to an appellate counsel who holds the client's best interests in mind. "[A]n indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments." Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746 (2000). According to Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396 (1967), a court-appointed appellate counsel has a duty to find, investigate, and brief all nonfrivolous issues before he is able to establish that the case is without merit. "Counsel appointed for state appeal who finds his case to be wholly frivolous, after conscientious examination, should so advise the court . . . supplying brief referring to anything in record that might arguably support appeal; copy of brief should be furnished defendant with time allowed to raise any points that he chooses, whereupon court should proceed, after full examination of all proceedings, to decide whether case is wholly frivolous . . . affording assistance of counsel to argue appeal if it finds legal points arguable on merits." Id. at 743. See, also, Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814 (1963)(An indigent has the same rights to effective assistance as any other U.S. citizen). "[T]here can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he

has.'" Douglas at 816 (quoting Griffin v. Illinois, supra, 351 U.S. 12, 19, 76 S.Ct. 585, 591 (1956)). Further, "[w]hen society acts to deprive one of its member of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. Id. at 817 (quoting Coppedge v. United States, 369 U.S. 438, 449, 82 S.Ct. 917, 923 (1962)). The Anders requirement "would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain ." Anders at 745.

The court in In Re Andrew B., 47 Cal.Rptr.2d 604 (Cal.App. 1995) stated that "[t]o satisfy federal constitutional concerns, appellate court ruling on counsel's motion to withdraw, in [Anders] brief, must satisfy itself that attorney has provided client with diligent and thorough search of record for any arguable claim that might support client's appeal, and must determine whether counsel correctly concluded that appeal is frivolous." Id. Further, the court noted that "[t]he duty of independent review is just the small tip of a very large iceberg called 'right to counsel' . . . we hold that [Anders] procedures are required simply because there is a right to appointed counsel. . . In short, so long as attorneys are appointed to represent indigents in appeals guaranteed as of right to rich and poor alike, so long as indigent criminal defendants . . . are entitled to the effective assistance of counsel, and so long as those appointed attorneys are required to conduct themselves as advocates, [Anders] review must follow as a matter of course." Id. at 607.

The California Criminal Code §1240.1 provides:

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal. With the notice of appeal the

attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading, or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal. If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

(c) The State Public Defender shall, at the request of any attorney representing a prospective indigent appellant or at the request of the prospective indigent appellant himself or herself, provide counsel and advice to the prospective indigent appellant or attorney as to whether arguably meritorious grounds exist on which the judgment or order to be appealed from would be reversed or modified on appeal.

(d) The failure of a trial attorney to perform any duty prescribed in this section, assign any particular point or error in the notice of appeal, or designate any particular thing for inclusion in the record on appeal shall not foreclose any defendant from filing a notice of appeal on his or her own behalf or from raising any point or argument on appeal; nor shall it foreclose the defendant or his or her counsel on appeal from requesting the augmentation or correction of the record on appeal in the reviewing court.

(e) (1) In order to expedite certification of the entire record on appeal in all capital cases, the defendant's trial counsel, whether retained by the defendant or court-appointed, and the prosecutor shall continue to represent the respective parties. Each counsel's obligations extend to taking all steps necessary to facilitate the preparation and timely certification of the record of all trial court proceedings. (2) The duties imposed on trial counsel in paragraph (1) shall not foreclose the defendant's appellate counsel from requesting additions or corrections to the record on appeal in either the trial

court or the California Supreme Court in a manner provided by rules of court adopted by the Judicial Council.

D. Arizona Approach

Arizona's approach is similar.

In State v. Clark, 196 Ariz. 530 (Ariz.App.1999), the court followed the same procedural structure outlined in Anders v. State of California, 386 U.S. 738, 87 S.Ct. 1396 (1967) for determining the extent of duties that court-appointed appellate counsel must fulfill in order to provide effective assistance to his client. According to the court in State v. Clark, before appointed counsel may dismiss the case without merit, he must put forth his best effort to investigate and discover all evidence and nonfrivolous points on appeal. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae . . . Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability." Id. at 534. Of course, the court notes, if appointed counsel thoroughly investigates the case and finds it to be wholly frivolous, he may not request withdrawal without preparing a brief "referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses." Id. This procedure allows an indigent defendant the same advocacy which any non-indigent would be able to secure. The court further states that its use of the Anders procedure ensures "that appointed counsel effectively performed requisite legal duties." Id. at 535.

CONCLUSION

What does our state require from appointed post-conviction counsel? Adopting an Anders-type procedure in Missouri would provide counsel and defendants needed guidance on this very question. And Ritz should be allowed to re-brief in light of such a procedure.

Alternatively, Ritz has diligently sought to have points briefed and through a failure of his appointed counsel at the Western District to follow existing rules governing counsel's duty they have not been briefed.

Ritz's appointed postconviction counsel, at the trial court and on appeal failed to brief key points of error from trial, failed to timely advise Ritz of the status of his appeal, investigate key evidentiary issues, and failed to file an appellate brief in the Western District that set forth points of error from which rational arguments for relief may be constructed based upon existing law. For all of the above-stated reasons, the Western District should be ordered to restart the briefing schedule on Ritz's appeal from the denial of his Amended 29.15 motion and allow Ritz leave to file a substitute brief with substitute counsel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of Relator's Brief and a disk with a copy of Relator's Brief was mailed this 26th day of July, 2004, by depositing same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Mr. Richard A. Starnes
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RULE NO. 84.06(b) CERTIFICATE

I hereby certify that this Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 10,523 words according to the word count of Corel Word Perfect Version 9.

GRAY, RITTER & GRAHAM, P.C.

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RULE NO. 84.06(g) CERTIFICATE

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

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